PUBLIC PROSECUTOR

v.

KASIHKU SDN. BHD.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL APPEAL NO. 41-85-89]
28 MARCH 1991

CRIMINAL PROCEDURE: *Failure of company to remit EPF contributions - Guilty plea - Payment by installments - Default - Order for recovery as civil debt - Imprisonment - Representative of company cannot be sent to prison - Company charged with offences - No prosecution against officer of company - Statutory requirements of CPC cannot be complied with - Warrant for levy of arrears by distress and sale of property of company - Discretion of Magistrate - Criminal Procedure Code, ss. 136, 173(a), 283(i)(b)(2), (i)(b)(3) - Employees Provident Fund Act 1951, ss. 16A(1)(c), (4), 17, 18(2).*

LABOUR LAW: *Failure of company to remit contributions - Plea of guilty - Default in penalty imposed - Whether representative of company can be sent to prison - Company charged with offence - No prosecution against officer of company - Employees Provident Fund Act 1951, ss. 16A(1)(c), (4), 17, 18(2).*

The defendant K, a limited company, had been charged with 3 counts of failure to remit to the Employees Provident Fund, EPF, contributions as required by s. 16A(1)(c) of the EPF Act (the Act) for the months of December 1986, January 1987 and February 1987. On 8 February 1988, K through its representative R, pleaded guilty to all 3 charges and a fine was imposed - K was also ordered to pay arrears of the prescribed contributions in installments within 7 months; however at the end of these 7 months not all the arrears were paid and on 29 October 1988 the Court extended the period for another 3 months it was ordered that if K defaulted, 'the defendant would be liable to an imprisonment order by the Court.' Again, payments weren't made and at the next mention on 27 February 1989 the Magistrate refused the request of the prosecution to send the manager of the defendant company, S, to prison and instead ordered that the balance of arrears remaining unpaid be sued as a civil debt (the said order). The Public Prosecutor appeals the order arguing that this revoked the previous orders given by Magistrates of co-ordinate jurisdiction allowing payment of the debt by installments over a certain time period K's Counsel argued that as K was a limited company and since there was a default after the extended period was given, the Magistrate should have issued a warrant for the levy of the amount by distress and sale of any property belonging to K under s. 283(i)(b)(3) of the Criminal Procedure Code (CPC). Further, he submitted that K cannot be imprisoned; neither could R - he also submitted that the EPF Board should take civil action against K to recover the balance of the arrears - this was so ordered by the Magistrate.

Held:

[1] The provision allowing a Court with criminal jurisdiction to order payment of arrears of prescribed contributions is a peculiar provision under s. 16A(4) of the Act.

[2] The Magistrate cannot order the representative of the company to be sent to prison for the default of the company in paying the arrears as it was the defendant company that was charged in Court for the offences.

[3](a) No prosecution was ever instituted against an officer of the defendant company unlike, as was pointed out, the situation in *Pillay's* case where a complaint was lodged against Pillay "as manager" of a company;

(b) there was no issue of process against any officer under s. 136 of the CPC (read with s. 3); and no person as officer of the defendant company was summoned to Court in the capacity of such officer;

(c) no person as officer of the defendant company was charged for the offences, let alone charged for the offences read with s. 18(2) of the Act;

(d) under s. 173(a) of the CPC, before a summary trial can begin in respect of a person accused of an offence, a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried - in this case, this could not be and was not done.

[4] It is therefore quite clear that a person, as an officer of the defendant company, cannot be sent to prison for offences preferred against the defendant company and for the failure of the defendant company to pay up the arrears ordered to be paid if there was no prosecution instituted against him as officer of the defendant company under s. 18(2) of the Act.

[5] The Magistrate was under a misconception that she could not proceed under s. 283 of CPC and has misread the decision of the Supreme Court in *Pontian Bus Berhad v. Public Prosecutor*.

[6] In this case, the order for the recovery of the arrears was made by a Court of criminal jurisdiction exercising powers under s. 16A(4) of the Act after the defendant company had pleaded guilty and the Court was therefore under a statutory duty under s. 16A(4) to order recovery of the arrears in the same manner as a fine.

[7](a) In exercising discretionary powers under s. 283(i)(b)(2) of the CPC, the first Magistrate of the Court allowed the defendant company to pay by installments; this was extended and when a substantial amount of the arrears remained unpaid after the extended period had expired, it is the undischarged duty of the Court to see that the order of the Court for the recovery of the arrears made under s. 16A(4) in the first instance is carried out under the provision of s. 283 of the CPC and any unpaid amount recovered;

(b) this can only been done by the incumbent Magistrate of the Court issuing a warrant under s. 283(i)(b)(3) for the levy of the amount by distress and sale of the property belonging to the defendant company if the Magistrate is not minded, after due enquiry, to giving another extension of time to the defendant company for the payment of the unsettled amount.

[8] The Magistrate has no discretion to refuse to take action once a defendant has been ordered by the Court (under s. 16A(4)) of the EPF Act to pay the arrears.

[The said order set aside; matter remitted to presiding Magistrate.]

Cases referred to:

Dunlop Malaysia Industries Bhd. v. Public Prosecutor [1985] 1 MLJ 313
Justin Milroy Narakera v. Public Prosecutor [1990] 2 CLJ (Rep) 181
Mek v. Che Mas [1948] MLJ 36
Pontian Bus Berhad v. Public Prosecutor [1988] 2 MLJ 530
The Coastal Bus Co. Ltd. v. PP [1962] MLJ 324

Legislation referred to:
Criminal Procedure Code, ss. 3, 136, 173(a), 283(i)(b)(2), (i)(b)(3)
Employees Provident Fund Act 1951, ss. 16A(1)(c), (4), 17, 18(2)
Subordinate Courts Act 1948, s. 99A

For the appellant - Zabidi, DPP
For the defendant - Choe; M/s. Syarikat Choe

JUDGMENT

KC Vohrah J:

In the Magistrate's Court the defendant, a limited company, was charged on 3 counts for failure to remit to the Employees Provident Fund (EPF) contributions as required by the Employees Provident Fund Act 1951 (Revised - 1982) (the Act) in respect of an employee's wages for the months of December 1986 (the 1st charge), January 1987 (the 2nd charge) and February 1987 (the 3rd charge) all of which were offences under s. 16A(1)(c) of the Act.

On 8 February 1988 the defendant company through a representative pleaded guilty to all 3 charges and a fine of RM120 in default of payment of which a term of 12 days' imprisonment was imposed on each charge. The fines were paid. In addition, in the same proceedings, the defendant company was ordered to pay arrears of prescribed contributions in respect of the wages of named employees amounting to RM17,543. The Court allowed this amount to be paid within 7 months starting with a first installment of RM2,543 payable on 1 March 1988 and the balance on 6 consecutive installments at RM2,500 per installment. At the end of 7 months not all the arrears were paid and eventually the defendant company was brought to Court again and another 3 months were given for the debt to be settled. No payments were made and the matter came up for mention before another Magistrate. The Magistrate refused to send the manager of the defendant company, who appeared at this hearing, to prison for the default of the defendant company in paying up the arrears and ordered that the balance of the arrears remaining unpaid be sued for as a civil debt. The Public Prosecutor has appealed against the order that the balance of the arrears remaining unpaid be recovered as a civil debt.

The provision allowing a Court with criminal jurisdiction to order payment of arrears of prescribed contributions is a peculiar provision under s. 16A(4) of the Act which reads:

> (4) Upon being found guilty of any offence under s. 16A(1)(c), the Court before which the employer is found guilty shall order such employer to pay to the board the amount of any contributions, together with any interest credited thereon, due and payable to the board and certified by the Accountant of the Board to be due from such employer, prior to the date of such founding of guilty (*sic*) and such contributions shall be recoverable in the same manner as a fine; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under s. 426 of the Criminal Procedure Code.

To come back to the earlier order allowing for the arrears to be paid by installments - the first installment was paid but the defendant company defaulted in paying all the other installments amounting to RM15,000. When the defendant company was brought to Court on 29 October 1988 it is not clear which officer from the defendant company appeared on its behalf. There was a request from this person for time for the defendant company to pay the balance of the arrears as he said that the company was running at a loss. The Magistrate acceded to the request and made this order,

> Defendant is given opportunity to settle the whole arrears due within 3 months' time in default will be liable to imprisonment to be ordered by the Court. (*sic*)

The case was adjourned to 27 February 1989 to be brought up for mention. On that date the manager of the defendant company, Encik Siew Choon Koon, appeared as officer of the company. The prosecuting officer informed the new Magistrate that the balance of the arrears had not been paid and requested for a term of imprisonment to be imposed on the manager for the default in the payment of the balance by the defendant company, no doubt harking back to the order of the previous Magistrate who noted that in default of settling the arrears within 3 months the

> defendant ... will be liable to imprisonment to be ordered by the Court.

The prosecuting officer also relied on para. 20 of the Third Schedule to the Subordinate Courts Act 1948, (read with s. 99A of that Act). Counsel for the defendant company stated the obvious that the defendant company being a limited company cannot be sent to jail (see *The Coastal Bus Co. Ltd. v. PP* [1962] MLJ 324). And he argued that the representative of the defendant company who had appeared that day could not also be sent to jail relying on *Dunlop Malaysia Industries Bhd. v. PP* [1985] 1 MLJ 313 which dealt with the issue of para. 20 of the Third Schedule to the Subordinate Court Act 1948. He suggested that the EPF Board take civil action against the defendant company to recover the balance of the arrears. The Magistrate agreed and ordered that (translated from Bahasa Malaysia):

> the arrears of RM15,000 be claimed as a civil debt under s. 17 EPF (*sic*) and the defendant cannot be sentenced to imprisonment...

In her grounds of decision she stated that she could not order the representative of the company to be sent to prison for the default of the company in paying the arrears. And she is clearly right in her decision in that respect. It will be noted that it was the defendant company that was charged for the offences in Court. Although there is provision under s. 18(2) of the Act for charging the director, manager, secretary or other similar officer of the defendant company for the offences and this was done in *Pillay v. PP* [1965] 1 MLJ 35 where the manager of a motor company was charged for an offence under the EPF Ordinance (as it was known then) and the same s. 18(2) was invoked to prefer the charge against Pillay (the manager of the company) this, however, was not done in the present case. Perhaps in not preferring a charge against an officer of the present defendant company the officer who directed the prosecution of the defendant company had in mind the words of the Ong J (as he then was) in *Pillay's* case,

> Justice is achieved in these cases of statutory strict liability by charging the company. To single out, instead, an officer of the company for punishment, unless he was in some way personally liable is an affront to moral conscience.

The point in this case is that no prosecution was ever instituted against an officer of the defendant company unlike, as was pointed out, the situation in *Pillay's* case where a complaint was lodged against Pillay "as manager" of a company. A complaint was lodged merely against the defendant company in this case. Naturally there was no issue of process against any officer under s. 136 of the Criminal Procedure Code (CPC) (read with s. 3); and no person as officer of the defendant company was summoned to Court in the capacity of such officer. Naturally, too, no person as officer of the defendant company was charged for the offences, let alone charged for the offences read with s. 18(2) of the Act. Under s. 173(a) of the CPC before a summary trial can begin in respect of a person accused of an offence, a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried. And of course this could not be and was not done. As was pointed out by Taylor J in *Mek v. Che Mas* [1948] MLJ 36 at 37:

> It is vital to justice that every person accused of an offence, however trivial, should be definitely charged and should have the opportunity to defend himself. I will deal first with the case of the complainant. No prosecution was ever instituted against her; no information was laid; she was not summoned; she was not charged. She was never called upon to plead ... She had no opportunity of defence or extenuation.

It is therefore quite clear that a person as officer of the defendant company cannot be sent to prison for offences preferred against the defendant company and for the failure of the defendant company to pay up the arrears ordered to be paid if there was no prosecution instituted against him as officer of the defendant company under s. 18(2) of the Act. In this respect it is apposite to bear in mind the words of Shankar J in the recent case of *Justin Milroy Narakera v. PP* [1990] 2 CLJ (Rep) 181 at 187:

> The prosecuting EPF officer however successfully persuaded the learned Magistrate that the inability to get at the company was no bar to getting immediately at Mr. Narakera because he was the Managing Director of the company who had negotiated the installments terms in question.
>
> This was done by resort to s. 18(2) of the EPF Act.
>
> It is the considered opinion of the Court that before resort can be had to this section the director of the corporation in question has to be formally charged and the ingredients of the section proved against him. The two ingredients required to makeout a *prima facie* case are that the company has committed the offence and secondly that the director was a director at the time the offence was committed.
>
> By transposing Mr. Narakera into the shoes of the company, as if he were its alter ego, without any evidence whatsoever before him of the second ingredient, the Magistrate did some thing which was totally impermissible in law. Had he been formally charged it would have been open to Mr Narakera even if he had been a director at the time, to give evidence of due diligence. The learned Magistrate pre-empted this right. Furthermore the liability to pay the arrears of contributions recoverable as a "fine" was the liability of the company. It does not automatically pass on to its directors under s. 18(2) of the Act. What fine a director must pay be assessed after he is convicted for the offence of which he is to be deemed guilty. That liability is to the fine *per se*. The liability to pay arrears of contributions which shall be recoverable as a fine is a liability of the employer alone under s. 16A(4).

As I have said earlier the Magistrate was clearly right in not acceding to the request of the prosecution officer to send the manager of the defendant company who appeared before her to prison for the default of the company. But she ordered that the balance of the arrears be recovered as a civil debt under s. 17 of the Act. The Public Prosecutor is dissatisfied with this order.

The point made by Encik Zabidi, the Deputy Public Prosecutor, in this appeal, as I understand him, is that when the said Magistrate made the order that the debt be recovered as a civil debt, she was in effect revoking the previous orders given by Magistrates of co-ordinate jurisdiction allowing for installment payments of the debt within a certain period and a subsequent extended period; that there being a default after the extended period was given, she should have issued a warrant for the levy of the amount by distress and sale of any property belonging to the defendant company under s. 283(i)(b)(3) of the CPC.

In a sense the learned DPP is correct in coming to that view but I think in reality the Magistrate was under a misconception that she could not proceed under s. 283 of the CPC. I have re-read the grounds of decision of this Magistrate as to why she made the order as she did.

And it seems to me she has misread the decision of the Supreme Court in *Pontian Bus Berhad v. PP* [1988] 2 MLJ 530. Wan Sulaiman SCJ in that case in fact said at p. 531, that (the notion) that the EPF Act:

> limits recovery of arrears of contribution only to those means available as in a civil debt ... is controverted by the words of s. 17(1) of the Act which states that all contributions payable under the Act may, **without prejudice to any other remedy,** be recoverable by the board summarily as a civil debt.

The point to remember in the case under appeal is that the order for the recovery of the arrears was made by a Court of criminal jurisdiction exercising powers under s. 16A(4) of the Act after the defendant company had pleaded guilty. And the Court was under a statutory duty under s. 16A(4) to order recovery of the arrears in the same manner as a fine. In exercising discretionary powers under s. 283(i)(b)(2) of the CPC the first Magistrate of the Court allowed the defendant company to pay by installments. When the first period of time within which the installments had to be paid expired (with a large amount of the arrears remaining unpaid), the second Magistrate of the Court allowed extension of the period for the installment payments. The extended period has expired and a substantial amount of the arrears remain unpaid. There remains the undischarged duty of the Court to see that the order of the Court for the recovery of the arrears made under s. 16A(4) in the first instance is carried out under the provisions of s. 283 of the CPC and any unpaid amount recovered. And this can only be done by the incumbent Magistrate of the Court issuing a warrant under s. 283(i)(b)(3) for the levy of the amount by distress and sale of the property belonging to the defendant company if the Magistrate is not minded, after due enquiry, to giving another extension of time to the defendant company for the payment of the unsettled amount.

It is for this reason that I must set aside the order of the Magistrate that the arrears be recovered as a civil debt. The order she made amounts to a refusal to take action under s. 283 of the CPC to recover the balance of the arrears remaining unpaid when in fact there is no discretion to refuse to take such action once a defendant has been ordered under s. 16A(4) of the Act, to pay the arrears by the Court.

The Magistrate who dealt with the matter under appeal has gone on transfer and I therefore remit the matter to whoever is the presiding Magistrate of the Court to exercise his discretion, within the ambit of the provisions of s. 283 of the CPC, whether to grant another period of extension within which the defendant company may pay the unsettled amount by installments or to issue a warrant for the levy of the amount by distress and sale after due enquiry of all relevant circumstances.

Also found at [1991] 2 CLJ 1192